No. 89-564

In The

# Supreme Court of the United States

October Term, 1989

MAURICE AND DOLORES GLOSEMEYER, ET AL.

*Petitioners,*

v.

MISSOURI-KANSAS-TEXAS RAILROAD, ET AL.

*Respondents.*

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

## MOTION AND BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF REVERSIONARY PROPERTY OWNERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## MOTION/INTEREST OF AMICUS CURIAE

The National Association of Reversionary Property Owners (NARPO) hereby moves for leave of court to file the attached amicus brief pursuant to Supreme Court Rule 36.

NARPO is a non-profit corporation under the laws of the State of Washington and was first organized in 1985 for the purpose of protecting the rights of property owners who may be divested of certain property rights as a result of the application of 16 U.S.C. 1247(d) and similar state and federal legislation. NARPO is on the daily Interstate Commerce Commission (ICC) register list and keeps informed on a daily basis of ICC activities involving proposed railroad right of way abandonments, including those abandonments where a request has been made by a third party for issuance of a Certificate of Interim Trail Use or Abandonment (CITU). NARPO further acts as a "clearing house" of information for property owners, their attorneys and other interested individuals who may be affected by the issuance of CITU's and is presently involved in several matters under consideration by the ICC involved in both the issuance of specific CITU's and proceedings for the implementation of 1247(d) rules.

The court below held that application of 16 U.S.C. 1247(d) was constitutional and did not result in a "taking" under the Fifth Amendment even though its application indefinitely postponed the vesting of Petitioner's property rights under existing state law. NARPO believes that this decision was incorrect. NARPO also believes that its involvement and expertise on the day to day application of 1247(d) will enable the court to examine

1 Petitioners Glosemeyer, et al. Respondent United States , and Respondent M-K-T Railroad have given written consent to the filing of the Amicus Brief by NARPO

the issues raised in the Petition for Writ of Certiorari from an informed perspective.

In conclusion, NARPO respectfully requests that this motion for leave to file the next amicus brief be granted.

Respectfully submitted this 30th day of October, 1989.

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### INTEREST OF AMICUS CURIAE

The interest in this matter of amicus National Association of Reversionary Property Owñers (NARPO) is set forth in the motion which accompanies this brief.

## STATEMENT OF THE CASE

The particular facts of this case are set forth in the Petition for Writ of Certiorari filed by petitioners Glosemeyer, and it would serve no purpose to repeat them in any detail at this time. However, for the purpose of this brief and in the interest of the constitutional issues involved, the following facts are relevant:

1. Petitioners own certain property adjacent to an abandoned railroad right-of-way in the State of Missouri. Petitioners claim that under Missouri law they hold fee title to the land underlying the railroad right-of-way and that the only interest ever held by the railroad therein was an easement for railroad purposes only.

2. Respondents Missouri-Kansas-Texas Railroad, et al., during the Interstate Commerce Commission (ICC) abandonment process, requested and was granted a Certificate of Interim Trail Use or Abandonment (CITU) under 16 U.S.C. §1247(d).[1]

3. The issuance of the CITU deprived petitioners of certain property rights in the right-of-way which would have otherwise vested at the time of abandonment by the carrier. Petitioners challenged the constitutionality of 1247(d) on several points including the claim that it was an unconstitutional exercise of the Commerce Clause and that it resulted in a taking in derogation of the Fifth Amendment. The court below, in an opinion dated July 5,

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[1] A CITU permits conversion of a railroad right-of-way to "interim" trail use while the right-of-way is "banked" for possible future restoration.

1989, rejected petitioners' claims and held the statute to be constitutional.

## ARGUMENTS IN SUPPORT OF PETITION

### I

### THE DECISION BELOW PERMITS AN UNCONSTITUTIONAL EXERCISE OF THE COMMERCE CLAUSE

#### A. No "Nexus" Between Purpose and Effect of 1247(d).

NARPO maintains, as do the Petitioners, that the standard of review for examining legislation which destroys and impairs state property rights is, or should be, "strict scrutiny". See *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987). Also see Petitioner's Brief at 18-21. The court below held to the contrary by stating that an act of Congress under the Commerce Clause is valid if

> (1) . . . There is any rational basis for a Congressional finding that the regulated activity affects interstate commerce; and (2) . . . The means chosen by [Congress are] reasonably adopted to the end permitted by the Constitution.

*Glosemeyer v. M-K-T R.R.*, 879 F.2d 316 (8th Cir. 1989).

No matter what the standard may be for examining the validity of a Commerce Clause act, there simply is not a sufficient "nexus" between the supposed "commerce purpose" of 1247(d) (rail banking) and its principal effect (conversion of railroad rights-of-way to trails). The following facts illustrate this point:

1. In Congress, 1247(d) was under the jurisdiction of the Senate Energy & Natural Resources Committee and the House Interior & Insular Affairs Committee and not the Congressional transportation committees which generally have jurisdiction over transportation and railroad related transportation. See generally S. Rep. No.98-1, 98th Cong., lst Sess.

2. 1247(d) was offered and codified as an amendment to the National Trails Act, not as part of Title 49 which is the section of the U.S. Code devoted to transportation and railroad legislation.

3. The ICC has acknowledged that the main purpose of 1247(d) was to "remove reversion as an obstacle" to the conversion of railroad rights-of-way to trail use. *Rail Abandonments – Use of Rights-of-Way As Trails*, 2 ICC 2d 591 at 597. ("Trails Act Rules"). This conclusion is supported by the legislative history of 1247(d). See generally H.R. Rep. No. 98-28, 98th Cong., lst Sess. at 8-9, reprinted in 1983 U.S. Code Cong. Admin. News 112.

4. The ICC has suggested that interested trail users may not want to proceed under 1247(d) if reversionary interests do not exist since any resulting trail use would be at the risk of restoration of railroad operations. See *Trails Act Rules* at 599. This comment seems odd in view of the "alleged" objective of 1247(d) to preserve railway corridors through the "rail banking" process. The ICC statement appears to support Petitioners' contention that 1247(d) is simply a "pre-text" to accomplish what property law would not otherwise permit without payment of just compensation – conversion of railroad rights-of-way to trail use.



5. Rail banking under 1247(d) is initiated by the interested trail group and perfected with approval of the railroad. CFR 1152.29(a) and (c). It is unreasonable to believe that Congress would have delegated the ability to "make or break" rail banking to trail groups (who want trails – not rails) and carriers (who want to abandon their lines) if the primary purpose of 1247(d) was to carry out the national policy of preserving rail corridors for future use.

6. If a group using a right of way for interim trail use elects to discontinue that use, it simply has to notify the ICC that it intends to vacate the right-of-way on a specific date and on that date the carrier will be entitled to an abandonment. 49 CFR 1152.29(c) (2).

7. The ICC is not required to make any finding that the right-of-way would be suitable for possible restoration. *National Wildlife Federation v. ICC*, 850 F.2d 694 (D.C. Circuit 1988) at 707. (The likelihood of future restoration of rail service at bar is *extremely* remote since (a) the right-of-way is subject to regular flooding, and (b) the carrier now uses the parallel line which is located on the opposite side of the Missouri River.) If the evidence establishes that restoration of rail services is unlikely, as the petitioners have done at bar, what possible commerce purpose is served by imposing "non-commerce" trail use on the property? In such a circumstance, the commerce purpose would be so remote and speculative that application of 1247(d) does not even come close to complying with the rational basis test used by the court below – let alone the "strict scrutiny" test the Petitioners allege should apply.

1247(d) is nothing more than a poorly disguised attempt to confiscate "in the name of commerce" private property rights for "recreational" purposes.[2] This court has invalidated governmental regulations for this very reason. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). (In Kaiser, the federal government imposed regulations which required that a private marina be opened to the public. This court invalidated the regulation since the Commerce Clause cannot be exercised in a manner which results in an unconstitutional taking). The decision below should be reversed and this court should hold that 1247(d) is an unconstitutional exercise of the Commerce Clause since any "nexus" between its supposed purpose and its principal effect is at most incidental.

**B. 1247(d) Permits a "taking" Without Compensation.**

The court below held that Petitioners could bring a claim for compensation under the Tucker Act if Petitioners believe that application of 1247(d) works a Fifth

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[2] NARPO suggests that the rail banking scheme is simply a "fiction". It is interesting to note that the comments of one trail group which called rail banking " . . . a complete myth if there ever was one, and both sides know it. . . ." *Bay State Trail Riders Association, Inc. and Southern New England Trails Conference Newsletter*, Sept. 1986, at 2. The news letter also made the following comment at 3:

> A lot of this waffling is grounded on the language of the Act (Sec. 1247(d)) which, I understand, was purposefully obfuscated in order to get the thing through – "snuck-in", so to speak, by trails lobbyists. . . .

Amendment taking. *Glosemeyer* at App. A, A-19. However, NARPO believes invalidation of 1247(d) is in order, at least as applied to Petitioner's property, because Congress did not intend to permit compensation for acquisition of trails under the Trails Act except where funds are expressly appropriated in advance. The court should consider the following on this issue:

1. The Senate Report on the National Trails System Act Amendments of 1983 (Public Law 98-11, later codified as 16 U.S.C. 1241, et seq.) provided the following analysis of Section 101 of the Act:

> Section 101 *restricts spending authority* in this bill to begin with fiscal year 1984. *Contractual obligations are also to be limited to amounts which are made available through appropriation measures.* (Emphasis added.)

S. Rep. 98-1, 98th Cong. lst Sess., at 4. Section 101, which was codified in the form of a note to 16 U.S.C. 1241, reads as follows:

> Notwithstanding any other provision of this Act, authority to enter into contracts, and to make payments, under this Act *shall be effective only to such extent or in such amounts as are provided in advance in appropriation acts.* (Emphasis added.)

2. 1247(d) is a vehicle that permits interested trail users, including private groups, state and local governments, to convert railroad rights-of-way to trails. See 49 CFR 1152.29(a). In view of the legislative history which indicates Congressional intent to carefully limit acquisitions to those situations where funds have been appropriated in advance, it would be ironic and certainly contrary to Congressional intent if the U.S. found itself the sole

legal obligor for unrestricted trail acquisitions by non-federal parties as might occur under 1247(d).

3. Several circuits have ruled that a railroad cannot be compelled to participate in a 1247(d) interim trail agreement. See *Washington State Dept. of Game v. ICC*, 829 F.2d 877 (9th Cir. 1987) and *National Wildlife Federation v. ICC*, supra. This provides a railroad with the ability to condition an agreement to participate in such an arrangement upon the receipt of monetary or other consideration. The result is that Congress, perhaps unintentionally, has vested in railroads the ability to "sell" a property right that might not otherwise have existed. It would be unreasonable and unrealistic to assume that Congress intended to create a property right in favor of railroads that would be financed by the U.S. government through Tucker Act claims.

The above facts suggest that Congress never intended to have the U.S. finance trail acquisition under 1247(d) and, therefore, a Tucker Act remedy does not exist. The conclusion which must be made is that invalidation of 1247(d) is the only appropriate remedy for Petitioners.

## II

## BROAD PUBLIC INTEREST/ JURISDICTIONAL CONFLICT

In 1985 2,950 miles of railroad right-of-way were abandoned, in 1986 2,087 miles were abandoned, in 1987 1,932 miles were abandoned, and in 1988 approximately 2,869 were abandoned. See 1987 and 1988 ICC Annual Reports. NARPO estimates that in rural areas there are

approximately five property owners per mile of right-of-way and up to forty to fifty owners per mile in urban areas. NARPO maintains that substantially more often than not the right-of-way is simply an easement for railroad purposes with fee title or the reversionary interest held by adjacent owners.

Interested parties need clear direction from this court regarding (a) the constitutionality of 1247(d), (b) if constitutional, whether its exercise effects a taking in violation of the Fifth Amendment to the United States Constitution, and (c) if application of 1247(d) effects a taking, is the remedy limited to a claim against the U.S. under the Tucker Act, or do other remedies exist for obtaining compensation against other 1247(d) trail participants.[3]

Unfortunately, the answers to these questions are the subject of great uncertainty because of inconsistent decisions by several circuits and the ICC:

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[3] NARPO maintains that a property owner who has suffered a taking as a result of 1247(d) should have a "Bivens" type claim against 1247(d) trail participants. A Bivens type action provides a claimant with a cause of action against individual government agents or private parties who, acting under the color of federal law, deprive an individual of constitutional rights. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Although the Bivens case involved a claim under the Fourth Amendment, it has subsequently been applied to the First Amendment, the due process clause of the Fifth Amendment, and the Eighth Amendment. See cases summarized in *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1332 (9th Cir. 1987). The Ninth Circuit in the recent case of *Trotter v. Watkins*, 869 F.2d 1312 (9th Cir. 1989) "assumed without deciding" that a Bivens action is also available under the takings clause of the Fifth Amendment.

1. On April 16, 1986, the ICC, in promulgating rules to implement 1247(d), held that mandatory imposition of the interim trail use scheme on railroads would constitute an unconstitutional taking of the railroad's property. Inexplicably, the ICC in the same decision, held that the imposing of trail use on the actual owners of the right-of-way (as are the Petitioners herein) would not be unconstitutional since these owners had no property right that "require[d] protection or compensation". See *Trails Act Rules* at 600.

2. In June 1988, the court in *National Wildlife Federation v. ICC, supra,* held that although 1247(d) was constitutional, its application could work a Fifth Amendment "taking" of the property rights of reversionary owners. The court remanded the claim of petitioner Beres therein back to the ICC for further consideration of the taking issue consistent with its holding.

3. In August 1989, the 2nd Circuit in *Preseault v. ICC,* 853 F.2d 145 (2nd Cir. 1988) held that 1247(d) was constitutional and that its application could *never* work a taking.

4. In February 1989, the ICC responded to the remand in *National Wildlife Federation v. ICC* by re-affirming the existing rules (rules which disregard the property rights of reversionary owners). The ICC stated that reversionary owners could proceed under the Tucker Act in the Court of Claims if they believed application of 1247(d) worked a taking, see *Rail Abandonments – Use of Rights-of-Way as Trails* – Supplemental Trails Act Procedures, 54 Fed. Reg. 8011 (1989). The petitioner in that matter is appealing the ICC decision (*Beres v. ICC,* D.C.

Cir. Court of Appeals No. 89-1178), although it is presently being held in abeyance pending the decision in *Preseault*.

5. On July 5, 1989, the court below "avoided" consideration of the merits of the 1247(d) taking issue by "delegating" it to the Court of Claims.

Application of 1247(d) has in the past, and will in the future, affect the property rights of thousands of property owners. It is essential that the courts, the ICC and the property owners themselves be given clear direction on the constitutional issues that arise from its application. Even though substantially identical constitutional issues have been raised in the *Preseault* case for which this court has noted probable jurisdiction under No. 88-1076, acceptance of this Petition for Writ of Certiorari is also in order for reasons which include the following:

1. This court has often noted probable jurisdiction in "takings" cases, though later deciding not to rule on the merits of the constitutional issues raised. By way of example see *San Diego Gas & Elec. v. City of San Diego*, 101 S.Ct. 1287 (1981) and *Williamson Co. Regional Planning v. Hamilton Bank*, 105 S.Ct. 3108 (1985).

2. This case presents a perfect opportunity for the court to consider the issue of whether application of 1247(d) can, under the pretext of the Commerce Clause, indefinitely postpone the vesting of recognized state property rights where the evidence establishes that the chance of restoration of rail service is extremely remote. This issue was disregarded by the ICC, *Rail Abandonments – Use of Rights-of-Way as Trails* – Supplemental Trails Act

Procedures, 54 Fed. Reg. 8011 (1989), despite the remand in *National Wildlife Federation v. ICC, supra,* at 708.

3. At a minimum, the court should defer consideration of this Petition until such time as a decision is rendered in *Preseault* so that (a) if a decision is rendered on the merits, the Petitioners herein can enjoy the benefits of that decision, or (b) if the court elects not to render a decision on the merits in *Preseault,* this case can then be given due consideration as a vehicle for deciding the constitutional issues raised in both *Preseault* and herein.

## CONCLUSION

Amicus NARPO respectfully requests that Petitioners' Writ of Certiorari be granted.

Respectfully submitted this 30th day of October, 1989.

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